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No. 08-1410

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

v.

NEW YORK STATE DIVISION FOR YOUTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR CORNELL RESPONDENTS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
REASONS FOR DENYING THE PETITION	4
I. Petitioner's Complaint Fails to State a Claim	5
A. Petitioner Fails to Plead Facts for a Plausible Conspiracy	7
B. An Exclusive Dealing Contract is Not Anti-Competitive	13
II. The Petition Raises an Issue That Was Not Previously Raised or Litigated in This Action	16
III. The Cornell Respondents Adopt the Arguments Submitted by the State Respondents in Opposition to the Petition.	20
CONCLUSION	22

TABLE OF CITED AUTHORITIES

Page

CASES

Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328 (2d Cir. 2006) 9

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 (1970) 17

Alderson v. New York State College of Agriculture and Life Sciences at Cornell University, 4 N.Y.3d 225 (2005) 2

Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937 (2009) 5, 6, 7, 9, 13

Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994) 16

Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98 (3d Cir. 1992) 14

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007) ..... *passim*

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 15

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 15

Cited Authorities

Page

California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.,
445 U.S. 97, 100 S. Ct. 937 (1980) 21

Chapman v. N.Y. State Div. for Youth,
546 F.3d 230 (2d Cir. 2008) 17, 18, 19, 20

Dothard v. Rawlinson,
433 U.S. 321, 97 S. Ct. 2720 (1977) 17

Dura Pharmaceuticals, Inc. v. Broudo,
544 U.S. 336, 125 S. Ct. 1627 (2005) 6

Eastern Food Services, Inc. v. Pontifical Catholic University Services Association, Inc.,
357 F.3d 1 (1st Cir. 2004) 14

Jefferson Parish Hospital Dist. No. 2 v. Hyde,
466 U.S. 2 (1984) 14

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574, 106 S. Ct. 1348 (1986) 10, 14

Menasha Corp. v. News America Marketing In-Store, Inc.,
354 F.3d 661 (7th Cir. 2004) 14

Parker v. Brown,
317 U.S. 341, 63 S. Ct. 307 (1943) 21

Cited Authorities

Page

Penn. Dep't of Corrections v. Yeskey,
524 U.S. 206, 118 S. Ct. 1952 (1998) 17

Tampa Electric Co. v. Nashville Coal Co.,
365 U.S. 320 (1961) 14, 15

STATUTES, RULES AND OTHER AUTHORITIES

Sherman Act, 15 U.S.C. § 1 ..... 3, 13, 14

Federal Rule of Civil Procedure 8(a)(2) 5

18 N.Y. Comp. Code R. & Regs. § 441.17 4

18 N.Y. Comp. Code R. & Regs. §§ 427.1-427.5 ... 4, 12

N.Y. Educ. L. § 5701 2

N.Y. Educ. L. §§ 350(3), 5714 2

N.Y. Soc. Serv. Law §§ 371 (16), (17);
460-a, -b, -c 4

N.Y. Social Servs. L. §§ 460, 460d, 462, 462-a,
462-b 4

INTRODUCTION

Petitioner is in the business of marketing a behavior management program for use by people working in an institutional or other organizational setting who must physically restrain individuals in their custody. Petitioner's program employs a series of manuals, performance-based training sessions, and audio visual productions, which they market to entities within New York State, throughout the United States, and internationally. Petitioner commenced this action on July 22, 2004, alleging ten causes of action against eighteen named defendants, including New York State administrative agencies and individually named state employees (hereinafter collectively "State Respondents"), Cornell University and various sub-units and individually named employees (hereinafter collectively "Cornell Respondents"), and Hillside Children's Center and individually named employees of Hillside. The complaint, in every imaginable theory, claimed that the State Respondents are unfairly excluding Petitioner from a limited portion of the market in favor of the Cornell Respondents and Cornell's training program called Therapeutic Crisis Intervention (hereinafter "TCI").

TCI is "a crisis prevention and intervention model for residential child care facilities" (J.A. 82).[1] It is designed to train staff in these facilities to "respond to both the feelings and behavior of children when they

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1. Citations to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit are designated in this brief as "J.A. __."

are upset, in crisis, or at their most destructive" (J.A. 104). The TCI educational curriculum was first developed in 1980 in a research center based at the New York State College of Human Ecology at Cornell University (hereinafter "College") (J.A. 81, 104). The College is one of fourteen colleges and schools that comprise Cornell University, a private not-for-profit educational institution chartered under the laws of the State of New York. N.Y. Educ. L. § 5701 *et seq*. The College is defined as a "statutory" or "contract" college operated by Cornell on behalf of the State of New York. N.Y. Educ. L. §§ 350(3), 5714. Its mission is "the improvement of family well-being and human welfare by means of education, research, extension teaching, and related public service in the fields of human development and the use of human and environmental resources...." N.Y. Educ. L. § 5714(2). The operational aspects of the College, including creating academic programs and curriculums, maintaining discipline, and formulating educational policies, are committed to Cornell's private control as a matter of state law. N.Y. Educ. L. § 5714(3); *see also Alderson v. New York State College of Agriculture and Life Sciences at Cornell University*, 4 N.Y.3d 225 (2005). The first TCI curriculum developed in 1980 was funded by a grant from the State of New York, with additional grant funds in 1982 from the National Center on Child Abuse and Neglect in Washington, D.C. (J.A. 104).

The most recent pertinent relationship between the Cornell Respondents and State Respondents regarding TCI is defined by a Memorandum of Agreement executed in 1984 by Cornell and New York State Department of Social Services, now known as the Office

of Children and Family Services (hereinafter "OCFS"). (J.A. 141-154). The purpose of the Memorandum of Agreement is

> [t]o fulfill the related missions of the University's statutory charge as partner with and on behalf of state government to pursue the educational and general life improvement needs of the people of New York State, and the Department's responsibility as the state agency created to fulfill the social service needs of the state; [and to] carry out the intent of the parties with regard to optimizing procedures for funding and administering a variety of Federal and University supported, State-sponsored social services training programs in the pursuit of the parties' common public service mandate . . . .

(J.A. 141). Cornell retains ownership of the curriculum, training materials, and any inventions developed as part of TCI, and the state and federal governments have unlimited use of such materials to reproduce, distribute and utilize consistent with 45 CRF Parts 6 and 8 (J.A. 152 at § 5).

The causes of action relevant to this Petition are the seventh and eighth causes of action in the Complaint alleging violations of the Sherman Act, 15 U.S.C. § 1, which Petitioner styles as "monopolies, restriction of trade and unfair competition" (J.A. 39-41 at ¶¶ 81-93) and "conspiracy to monopolize and restrict trade" (J.A. 41-42 at ¶¶ 94-98). Petitioner's complaint alleges, in substance, that the State Respondents and Cornell Respondents conspired to fix the prices charged to

licensed facilities in New York, which are required by state law and regulations to have training in the restraint of juveniles in the care of those facilities (J.A. 31 at ¶¶ 36, 38, and J.A. 39-40 at ¶¶ 83, 88-90); *see* N.Y. Soc. Serv. Law §§ 371 (16), (17); 460-a, 460-b, 460-c, 462, 462-a, 462-b; 18 N.Y. Comp. Codes R. & Regs. § 441.17. Petitoner's allegations, however, fail to address the critical fact – a fact fatal to the claims – that the State of New York, not the facilities themselves, is the consumer (*see, e.g.*, J.A. 30-32, 39-40 at ¶¶ 27, 35-36, 40, 87, 91; *see also* 18 N.Y. Comp. Codes R. & Regs. §§ 427.1-427.5). Thus, ignoring the sound fiscal and public service goals that define the relationship between the alleged co-conspirators, Petitioner alleges a purported agreement between the State and Cornell to suppress competition, through which the State retains Cornell to provide services for the State and for which the State agrees – for reasons petitioner has not identified – to pay inflated prices. Petitioner's allegations are preposterous. Petitioner did not and cannot allege a plausible antitrust violation on these facts.

REASONS FOR DENYING THE PETITION

The Petition is laden with speculation regarding coercive conduct by the alleged co-conspirators and the anticompetitive effect of such conduct, but the complaint is devoid of facts to cast even a shadow of plausibility over the antitrust claims Petitioner strives to reinstate following their dismissal for failure to state a claim.

Despite the Petition's repeated references to the "pleading stage" of the case at the time of dismissal (*see, e.g.*, Petition pp. 9. 15, 20-21, 27), notably absent from the Petition is any mention of the pleading

standards recently analyzed and clarified by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). The omission is all the more striking because the complaint plainly relies on labels and conclusions to set forth the grounds upon which its claims rest, while both decisions soundly reject such assertions as an insufficient substitute for factual allegations: "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at __, 129 S. Ct. at 1949, *quoting Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.

I. Petitioner's Complaint Fails to State a Claim

The District Court had entered its judgment dismissing the case for failure to state a claim and the parties had fully briefed the appeal in the Second Circuit when this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). In *Twombly*, this Court expounded upon the pleading requirements for claims under § 1 of the Sherman Act, emphasizing that in order to state a claim the complaint must plead "plausible grounds to infer an agreement," that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965. The Court wove this requirement directly into the fabric of Federal Rule of Civil Procedure 8(a)(2) that the complaint contain enough facts to "sho[w] that the pleader is entitled to relief." *Id.* at 557, 127 S. Ct. at 1966; *see also id.* at 556 n. 3, 127 S. Ct. at 1965 (noting that a "blanket assertion" of entitlement to relief is not enough). "[W]hen the

allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 558, 127 S. Ct. at 1966, *quoting* 5 Wright & Miller § 1216, at 233-34 (internal quotations and citations omitted). Indeed, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." *Id.* at 559-60, 127 S. Ct. at 1967, *quoting Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347, 125 S. Ct. 1627, 1634 (2005) (internal quotations and citations omitted, alteration in *Dura*).

More recently, the Court elaborated on the *Twombly* standard in *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). The Court reiterated that a complaint must be "plausible on its face" to survive a motion to dismiss, meaning that the complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (repeatedly citing *Twombly*).

The *Iqbal* Court clearly laid out the same two-pronged analysis used in *Twombly* to assess motions to dismiss. The first prong begins with the tenet that the court must accept as true the factual allegations pled in the complaint, but explicitly notes the inapplicability of that tenet to legal conclusions that a plaintiff attempts to disguise as factual allegations. "Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. So, the first step is to identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Once these allegations have been identified and discounted, the court must review the remaining well-pleaded, nonconclusory allegations and determine whether they state "a plausible claim for relief." *Id.* Common sense and judicial experience are to be applied, and if the well-pleaded, nonconclusory facts do not permit an inference beyond a mere possibility of misconduct, the complaint should be dismissed because "the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.*, *quoting* Fed. R. Civ. Pro. 8(a)(2).

A. Petitioner Fails to Plead Facts for a Plausible Conspiracy

Applying the *Twombly-Iqbal* analysis, Petitioner's complaint fails as a matter of law for two separate reasons: (1) the economic theory underlying the conspiracy alleged by Petitioner is implausible on its face; and (2) the product and geographic markets alleged by Petitioner artificially and implausibly cherry-pick the only markets in which they can even allege that the State Respondents and Cornell Respondents are involved, ignoring the far broader market in which they actually compete to do business. Indeed, this pleading ploy was so transparent the District Court dismissed the complaint with prejudice based on petitioner's failure to define a proper product and geographic market to substantiate their claims and the impossibility of curing the defects through amendment of the complaint (Petition Appendix A, 20a-26a). The Second Circuit

affirmed, emphasizing the implausibility of the overly narrow market Petitioner tried to construct by defining "market" solely in terms of the harm they claim they suffered as a result of the respondents' alleged conduct, rather than taking into account, as the District Court properly did, the larger market in which Petitioner actually compete (Petition Appendix B, 37a-39a). This case simply does not present the facts necessary to address the question proffered in the Petition and, therefore, certiorari should be denied.

There are three sections of the complaint that are relevant to the § 1 claims before this Court: the "Factual Allegations" section (¶¶ 23-41), the Seventh Cause of Action (¶¶ 81-93), and the Eighth Cause of Action (¶¶ 94-98). Few paragraphs allege any action at all on the part of the Cornell Respondents. Indeed, the allegations against Cornell seem to be that Cornell developed a use of force program in conjunction with OCFS which Cornell administers and controls (¶ 35), that TCI illegally incorporated HWC's materials (¶ 37), that this "theft" somehow gave Cornell a monopoly (¶ 38), and that Cornell charges New York State 4-10 times more for training services than it charges out of state customers (¶ 40). Allegations conclusorily reiterating the creation of a monopoly, and charging New York State inflated rates are made in ¶¶ 90-91. The complaint also alleges that the Cornell Respondents "knew, participated in, acquiesced, benefited from or accepted the plan by which under color of state law TCI was allowed to obtain an exclusive monopoly" over the relevant training services (¶ 95) and that the Cornell Respondents knew or should have known about the inflated rates being charged (¶ 97). Petitioner makes

other allegations regarding the illegal procurement of federal funds, but these allegations are not relevant to the § 1 claim. The complaint also alleges that OCFS compelled private child care providers to use TCI as their training provider (¶¶ 36 and 88-89); however, these paragraphs do not allege any actions on the part of the Cornell Respondents.

Under *Iqbal*, Petitioner's bare conclusions masquerading as factual allegations are not entitled to an assumption of truth. *See also Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss"). Petitioner's allegation that the conspiracy between the State Respondents and the Cornell Respondents creates a monopoly is a bare conclusion, not a legitimate factual allegation. Furthermore, the assertion that the Cornell Respondents "knew, participated in, acquiesced, benefited from or accepted" a plan to obtain an exclusive monopoly is analogous to the "bare assertion of conspiracy" that the Court found inadequate in *Twombly*. 550 U.S. at 556. These allegations are therefore not entitled to any presumption of truth.

Removing these allegations from the equation, all that remains of the alleged conspiracy are allegations that: the Cornell Respondents administer and control a restraint training program developed in conjunction with OCFS; the Cornell Respondents illegally incorporated Petitioner's materials into this program; and the Cornell Respondents charge New York State 4-10 times more for providing restraint training services

than charged to out of state customers. Even if true, none of these unsavory accusations evidence a conspiracy to restrain trade. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593, 106 S. Ct. 1348, 1359 (1986) ("[c]ourts should not permit fact finders to infer conspiracies when such inferences are implausible because the effect of such practices is often to deter pro-competitive conduct"). Cornell, as an educational institution, certainly has not done anything untoward by developing a restraint training program for use in the fields of human development and human resources. Illegally using Petitioner's materials, if true, might support a claim of copyright infringement, but Petitioner has never asserted such a claim against the Cornell Respondents and that matter is not before the Court.

When looking for a "plausible suggestion of conspiracy" it is clear that the facts presented do not, just as the facts presented in *Twombly* did not, nudge the pleaded claims "across the line from conceivable to plausible," and the complaint was properly dismissed with prejudice for the reasons stated by the District Court (Petition Appendix A, 21a-24a). *See Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. Petitioner failed to properly define the relevant market in economically meaningful terms. Moreover, the complaint itself alleges antitrust injury that is contradictory to the alleged conspiracy to monopolize trade in the market Petitioner artificially creates: "OCFS in conjunction with Cornell University, New York State College of Human Ecology and TCI have illegally coerced *monopoly control over* crisis intervention, behavior management and restraint training services to *private child care*

providers located within the State of New York" (J.A. 40 at ¶ 90, emphasis added), and yet the antitrust injury is purportedly to ". . . Petitioner's [sic] ability to *fairly compete for national and international training contracts* thereby causing injury . . ." (J.A. 40-41 at ¶¶ 93, 98, emphasis added). Petitioner's own admissions establish, at a minimum, a nation-wide market for the training services at issue.

Petitioner argued on appeal that the District Court misread Petitioner's relevant market allegations and that Petitioner did in fact present a plausible market of "training services to New York State child care providers." Petitioner's Brief at 25-26. The Second Circuit disagreed, finding that the District Court correctly identified Petitioner's allegations and found them implausible because they artificially limit the market to OCFS-regulated purchases within the State of New York where OCFS exercises decisionmaking, rather than the broader market in which Petitioner actually operates (Petition Appendix B, 39a). The District Court correctly concluded that the market must be viewed as a whole, that is, "the total demand for restraint services," not just in the child care area but in other areas including social services agencies, law enforcement agencies, correctional facilities, educational institutions, and airlines (Petition Appendix A, 23a; Petition Appendix B, 38a-39a). In fact, Petitioner's own allegations support this construction of the market, as Petitioner offers its behavior management program in all of these areas within the State of New York, throughout the United States, and internationally (*see* J.A. 26, 31, 40-42 at ¶¶ 4, 33, 93, 98; *see also* J.A. 235, 238, 242, 253, 259-261). Curiously, at page 9 of

the Petition, Petitioner goes so far as to rely upon the selection of their program over TCI's by the New York State United Teachers, arguing that this supports the superiority of their program over TCI. What Petitioner fails to recognize is that it also confirms a broader market than the one Petitioner attempts to concoct to support their claims. Anti-competitive conduct cannot be artificially constructed as Petitioner attempts to do here. This Court reviews factual allegations and inferences raised therefrom "in light of common economic experience" in order to assess the plausibility of an antitrust conspiracy theory. *Twombly*, 550 U.S. at 565, 127 S. Ct. at 1971. Petitioner's theory, constraining the market definition to the harm they suffered, is simply not plausible.

Moreover, Petitioner's allegation that Cornell is charging New York State exorbitant rates is actually suggestive that there is no conspiracy. As the allegation suggests, New York State pays the costs of restraint training for the private agencies in question (J.A. 32, 40 at ¶¶ 40, 91; *see also* 18 N.Y. Comp. Code §§ 427.1-427.5). Petitioner absurdly suggests that the State has conspired with Cornell to overcharge itself. Petitioner has tried to escape the obvious illogic of this allegation by suggesting that OCFS recovers 75% of the training costs from the federal government (Petition at p. 8). While that allegation does not even appear in the complaint, it is irrelevant because simple mathematics reveals that such a program would not benefit OCFS even with a 75% reimbursement from the federal government, because the 25% it is admittedly paying would still be artificially inflated by 4 to 10 times. Petitioner has not offered any economically plausible

explanation for why OCFS would conspire with Cornell to inflate the rates it pays Cornell thereby enriching Cornell at its own expense.

Petitioner's complaint plainly fails to state a claim under the standards articulated in *Twombly* and further explained in *Iqbal*. Removing the conclusory allegations from the Complaint results in allegations that do not even hint, much less plausibly suggest, a conspiracy that suppresses competition. The Court should deny the petition for certiorari on this ground.

B. An Exclusive Dealing Contract is Not Anti-Competitive

The allegations in this case posit a situation that is the functional equivalent of an exclusive dealing contract between New York State and Cornell. The complaint (as well as the enabling legislation and applicable regulations) contains allegations making it plain that it is New York State, and not the private foster care agencies, that is the true consumer in this case. Thus, as noted *supra*, Petitioner alleges in effect that the State and Cornell conspired to inflate the rate the State pays Cornell for the service provided. For example, Complaint ¶ 91 alleges that Cornell is charging New York State excessive prices for its services. Petitioner has not alleged and cannot allege that an exclusive dealing contract situation violates § 1 of the Sherman Act. The District Court recognized as much, basing its decision in part on the fact that "a proper antitrust market" cannot be "defined in terms of the purchase(s) of a single-buyer" (Petition Appendix A, 22a).

Exclusive dealing arrangements are "not disfavored by the antitrust laws." *Eastern Food Services, Inc. v. Pontifical Catholic University Services Association, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004). Indeed, there may be "legitimate business justifications" (*Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 111 (3d Cir. 1992)) for such arrangements, which also "may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45, 104 S. Ct. 1551, 1576 (1984) (O'Connor, J., concurring). Competition for an exclusive dealing contract is "a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). Moreover, where there is "no rational motive to conspire, and the conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy [to fix prices or impede competition]." *Matsushita*, 475 U.S. at 596-97, 106 S. Ct. at 1361.

This Court has discussed exclusive dealing contracts in the related, although more broadly proscriptive, context of § 3 of the Clayton Act. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335, 81 S. Ct. 623, 632 (1961) (noting that if an exclusive dealing contract does not violate § 3 of the Clayton Act, it by definition does not violate §§ 1 or 2 of the Sherman Act). In this context, the Court explained that exclusive dealing arrangements do not violate the antitrust laws unless it is "probable that performance of the contract will foreclose competition in a substantial share of the line

of commerce affected." *Id.* at 327. In making this determination "the threatened foreclosure of competition must be in relation to the market affected." *Id.* Thus, a complaint based on an exclusive dealing arrangement cannot state a claim unless the allegations therein provide some basis for inferring that the arrangement in question will significantly impair competition in a relevant market. "[T]he antitrust laws...were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521 (1962)).

In this case, Petitioner has acknowledged that Handle With Care "provid[es] crisis intervention services in interstate commerce" (J.A. 26 at ¶ 4). The complaint alleges that Cornell also provides services like the ones it provides to OCFS to out of state customers (J.A. 40 at ¶¶ 91, 93). The Second Circuit highlighted Petitioner's admissions that "Handle With Care is marketed to and utilized by various organizations, institutions, and agencies that are not child care providers," and that "plaintiffs readily admit in their complaint that they compete for such contracts on a 'national and international' basis" (Petition Appendix B, at 38a). The Second Circuit found "[t]he unifying characteristic of this market is that each purchaser needs to restrain individuals, not just children" (Petition Appendix B, at 38a).

Even assuming as true the allegation in Petitioner's complaint that OCFS chose TCI as the preferred use of force training program for private child care providers

subject to licensing requirements administered by OCFS (J.A. 39-40 at ¶¶ 88, 89), that fact alone does not implicate anti-competitive conduct within the meaning of the antitrust laws. *See Balaklaw v. Lovell*, 14 F.3d 793, 797, 798-800 (2d Cir. 1994) (petitioner suffered a direct economic injury as a result of defendants' actions when he lost out in competition for an exclusive contract, but "there is no evidence that this injury was of the type the antitrust laws were intended to prevent") (internal quotations and citations omitted). Given the undeniably large market for the services Petitioner markets, there is simply nothing in the complaint that indicates that New York State's decision to purchase training in the restraint of children exclusively from Cornell has affected the market for Petitioner's services in any economically meaningful way. Again, the patent implausibility of Petitioner's conspiracy theory becomes apparent when one considers the reality of the market in which Petitioner admittedly operates. The complaint was properly dismissed with prejudice, and this Petition for certiorari should be denied.

II. The Petition Raises an Issue That Was Not Previously Raised or Litigated in This Action

It is not surprising that the Second Circuit did not address the argument Petitioner now advances in this Court — that it was not required to plead a relevant market – because it was not raised in the District Court and was not raised in the Second Circuit until after the decision affirming the District Court's dismissal was entered, when Petitioner filed an application for hearing en banc. Petitioner's arguments before the lower courts were instead predicated on the notion that the

complaint in fact had pleaded a relevant market, implicitly recognizing the validity of the requirement. It is the long-standing policy of this Court not to consider issues that were not considered by the courts below. *See e.g. Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S. Ct. 1952, 1956 (1998) ("Petitioners raise this question in their brief . . . but it was addressed by neither the District Court nor the Court of Appeals . . . 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, 90 S. Ct. 1598, 1603 (1970)); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1, 97 S. Ct. 2720, 2724 (1977) (where "appellants sought to raise for the first time in their brief" a claim of unconstitutionality, the court declined to considered the issue because "[n]ot having been raised in the District Court, that issue is not before [the court]").

A careful examination of the Petitioner's arguments in the courts below plainly reveals that Petitioner did not properly raise or preserve in the courts below the issue now presented to this Court for adjudication. To the contrary, Petitioner repeatedly framed the issue in the context of the market analysis now claimed to be inapplicable. In opposition to the motions to dismiss the antitrust claims filed in the District Court, Petitioner argued that the antitrust claims were well pled, the complaint "clearly defines the market in issue," and further that the complaint "identifies a concrete geographic market." Plaintiffs' Consolidated Brief Opposing Defendants' Motions to Dismiss, *Chapman v. N.Y. State Div. of Youth*, 1:04-cv-0867 (Docket No. 67, at 12). Petitioner explicitly defined the market as "the

market in crisis intervention services that are available to Private Agencies that was illegally curtailed by OCFS." *Id.* at 13. Petitioner argued further that the complaint "unambiguously show[s] market injury" by alleging that all restraint-training vendors marketing to agencies licensed by OCFS had been "locked out of the market." *Id.* at 14. Notably, Petitioner did not argue that such a showing meant it was not required to plead a relevant market.

Instead, Petitioner argued that it was not required to plead a relevant geographic market, because the alleged conduct is a per se antitrust violation. This argument was apparently based on the fact that "Defendants [sic] anticompetitive conduct here was motivated solely by the desire to defraud the government," and such conduct "could never be justified by the 'rule of reason.'" *Id.* These arguments, which constitute approximately two pages of Plaintiffs' Consolidated Brief Opposing Defendants' Motions to Dismiss, are the entirety of Petitioner's analysis of the relevant market issue. Petitioner used the phrase "rule of reason" only once, on page 14, in the context of arguing that the conduct in issue constitutes a per se violation of § 1. No mention was made of Petitioner's argument in the pending Petition.

Before the Second Circuit, Petitioner again omitted the issue raised in the Petition, despite the fact that the relevant market requirement was a key issue on appeal. In the Corrected Brief for Plaintiffs-Appellants, *Chapman v. N.Y. State Div. of Youth*, 05-7010-cv (filed July 10, 2006), Petitioner asserts that the District Court misread Petitioner's relevant market allegations.

Petitioner argues that a market need only be "plausible," and that its market of "training services to New York State child care providers" is a plausible market. *Id.* at 26-27. Petitioner discussed the relevant regulatory scheme, arguing that OCFS plays an important role on both the seller's and the buyer's side of the market, and that such a unique regulatory scheme calls for a unique definition of market. *Id.* at 27-28. Petitioner further argued that "the propriety of the relevant market alleged is also amply demonstrated by the fact that the prices charged and paid in this market are significantly higher than in other markets." *Id.* at 29, *see also id.* at 30-35. Not once did Petitioner assert that there was no requirement of a detailed market analysis to substantiate its claims. Quite the contrary, Petitioner argued that because entry into the market is regulated, the regulated market is the relevant market in which to analyze its claims. *Id.* at 37; *see also id.* at 39 ("the relevant market analysis has merit").

The first time Petitioner actually asserted the argument upon which its Petition is based was in a petition for rehearing following the Second Circuit's decision, *inter alia*, affirming the District Court's dismissal of the antitrust claims. Petition for Panel Rehearing, Petition for Rehearing En Banc, *Chapman v. N.Y. State Div. of Youth*, 05-7010-cv (filed December 4, 2008), at 7-8. Petitioner argued, too little too late, that pleading specific and actual adverse effects on competition obviates the need to plead a relevant market, identifying the purported adverse effects in this case as "supracompetitive prices" and "the horizontal exclusion of vendors competing to provide restraint

training." *Id.* The issue was never litigated, however, because the Second Circuit denied the Petition for Rehearing (Petition Appendix C, 40a-41a).

In short, Petitioner implicitly – if not explicitly – acknowledged that it was required to plead a relevant market in all previous proceedings in this case, arguing explicitly that the complaint satisfied this requirement by pleading an appropriate market. Only after this argument failed both in the District Court and the Second Circuit did Petitioner shift ground to the position posed in the Petition. Given Petitioner's failure to raise the issue in the courts below, it was not preserved and certiorari should be denied on this ground as well.

III. The Cornell Respondents Adopt the Arguments Submitted by the State Respondents in Opposition to the Petition.

In addition to the arguments submitted herein, the Cornell Respondents incorporate by reference and adopt all arguments proffered by the State Respondents in opposition to the Petition as additional grounds to deny certiorari in this matter, to the extent such arguments are applicable to the Cornell Respondents.

In particular, at all stages of this litigation, both the State and Cornell Respondents have urged the courts to dismiss the complaint on the basis that the alleged misconduct is protected by the state action immunity doctrine. The conspiracy alleged by Petitioner clearly arises from the state's exercise of its sovereign power to regulate facilities providing care or custody of

children, and therefore it cannot form the basis of an antitrust claim – even if the state action has anti-competitive consequences. Thus, even if Petitioner's allegations of a conspiracy were true, they would fail to state a claim because the Cornell Respondents together with the State Respondents would have complete immunity under the long established state action immunity doctrine. *Parker v. Brown*, 317 U.S. 341, 350-352, 63 S. Ct. 307, 313 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."); *see also California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937 (1980) (conduct "actively supervised" by the state is entitled to state action immunity). As the foundation for Petitioner's conspiracy theory is the 1984 Memorandum of Agreement between Cornell and the State Department of Social Services (J.A. 141-154), and the complaint itself admits the active supervision of the State Respondents (J.A. 31, 39-40), there is no doubt that the Cornell Respondents are entitled to the protection of the state action immunity doctrine. Although neither the District Court nor the Second Circuit chose to engage in an analysis of this issue, having decided the § 1 claims on the relevant market requirement, it remains a valid ground on which this Court could and should decline to grant certiorari.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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